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No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 459 F.3d 827. The order and opinion of the district court (App., *infra*, 20a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 107 and 113 of CERCLA, 42 U.S.C. 9607, 9613, are reproduced in the appendix to this petition (App., *infra*, 29a-76a).

STATEMENT

This case presents the principal question left open by this Court two Terms ago in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004): Whether a party that is potentially responsible for the cleanup of property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but is not eligible to bring an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may nevertheless bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a). In this case, the Eighth Circuit, consistent with an earlier decision of the Second Circuit but in conflict with a later decision of the Third Circuit, held that a potentially responsible party could pursue such an action under Section 107(a). The Eighth Circuit's decision is incorrect and merits this Court's review.

1. Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). As amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, CERCLA provides the President, acting primarily through the Environmental Protection Agency (EPA), with several alternative means for cleaning up contaminated property. Section 104 of CERCLA authorizes EPA to undertake response actions designed to remove

hazardous substances, using monies from the Hazardous Substances Superfund. See 42 U.S.C. 9604; *Bestfoods*, 524 U.S. at 55. Section 106(a) permits EPA to compel, by means of an administrative order or a request for judicial relief, other persons to undertake response actions, which EPA then monitors. See 42 U.S.C. 9606(a). A person subject to such an order may petition EPA for reimbursement of its costs and, if the petition is denied, may bring suit to recover those costs on the ground that the person is not liable or that the selected response action was improper. See 42 U.S.C. 9606(b).

Section 107(a) imposes liability for cleanup costs on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs)—associated with the release or threatened release of hazardous substances. See 42 U.S.C. 9607(a). PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons who arranged for disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances. See 42 U.S.C. 9607(a)(1)-(4). Unless they can invoke a statutory defense or exclusion, persons who qualify as PRPs are liable for, *inter alia*, "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(A), and "any other necessary costs of response incurred by any other person consistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(B).[1]

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[1] The national contingency plan consists of federal regulations that prescribe the procedure for conducting hazardous substance cleanups

Since the enactment of CERCLA, courts have consistently held that the United States (or a State or an Indian tribe) may bring suit against any PRP under Section 107(a)(1)-(4)(A) to recover response costs that it has incurred, and may proceed on a theory of joint and several liability (except to the extent that the PRP can show that the alleged harm is divisible). See, *e.g.*, *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997). Before CERCLA was amended by SARA in 1986, however, lower courts disagreed on whether one PRP could bring an action against another PRP for contribution or cost recovery, and, if so, the source of authority for such an action. Compare, *e.g.*, *City of Philadelphia* v. *Stepan Chemical Co.*, 544 F. Supp. 1135, 1140-1143 (E.D. Pa. 1982) (holding that PRP had right to cost recovery under Section 107(a)(1)-(4)(B)), and *United States* v. *New Castle County*, 642 F. Supp. 1258, 1261-1269 (D. Del. 1986) (holding that PRP had right to contribution under federal common law), with *United States* v. *Westinghouse Electric Corp.*, No. IP 83-9-C, 1983 WL 160587, at *3-*4 (S.D. Ind. June 29, 1983) (holding that PRP had no right to contribution).

With the enactment of SARA, Congress added Section 113(f), which expressly supplies PRPs with a cause of action against other PRPs in certain circumstances. See 42 U.S.C. 9613(f). First, Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. 9613(f)(1). With regard to such actions, Section 113(f)(2)

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under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300.

specifies that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. 9613(f)(2). Second, Section 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in [Section 113(f)(2)]." 42 U.S.C. 9613(f)(3)(B). After SARA's enactment, courts of appeals consistently held that a PRP could not bring an action against another PRP for cost recovery, on a theory of joint and several liability, under Section 107(a), but was instead limited to an action for contribution under one of the two provisions of Section 113(f).[2]

In *Cooper Industries*, *supra*, this Court held that, in order to pursue an action for contribution against another PRP under Section 113(f)(1), a PRP must itself be sued under either Section 106 or Section 107(a). See 543

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[2] See *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *New Castle County*, 111 F.3d at 1121-1124; *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Technologies Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

U.S. at 165-168. The Court left open the question presented here—namely, whether a PRP could bring an action against another PRP for cost recovery under Section 107(a), see *id.* at 168-170—but it noted that "numerous decisions of the Courts of Appeals" had held that an action under Section 107(a) for cost recovery, on a theory of joint and several liability, was unavailable, *id.* at 169.

2. As alleged in the complaint, respondent leased property in an industrial park in Camden, Arkansas, from 1979 to 2003. From 1981 to 1986, respondent retrofitted rocket motors under contract with the United States. In the course of conducting that retrofitting, respondent used a high-pressure washing system to remove propellant from the motors. Wastewater containing the propellant contaminated soil and groundwater at the site. Respondent also burned quantities of propellant, further contaminating the soil and groundwater. In addressing the contamination, respondent incurred various cleanup costs. App., *infra*, 23a-25a.

In 2002, respondent filed suit against the United States in the United States District Court for the Western District of Arkansas, seeking to recover costs from the government (as a PRP) under either Section 113(f) or Section 107(a). After this Court's decision in *Cooper Industries*, respondent dropped its Section 113(f) claim. The government moved to dismiss the action for failure to state a claim on the ground that, because respondent was a PRP, it could not bring suit under Section 107(a).

3. The district court granted the motion to dismiss. App., *infra*, 21a-28a. Relying on an Eighth Circuit decision that preceded *Cooper Industries*, the district court concluded that "a party that is subject to CERCLA liability is limited to seeking contribution from other

jointly liable parties in accordance with Section 113(f), unless the PRP qualifies for one of three defenses." *Id.* at 25a. The court rejected respondent's contention that *Cooper Industries* had "undermined the fundamental support for [the Eighth Circuit's decision] and other circuits' decisions that Section 113(f) limits PRPs' claims for contribution and precludes actions between PRPs for direct recovery under Section 107(a)." *Id.* at 26a.

4. The court of appeals reversed. App., *infra*, 1a-19a. The court noted that, while *Cooper Industries* had left open the question whether a PRP could proceed under Section 107(a), it had indicated that Sections 107(a) and 113(f) provided "distinct" remedies. *Id.* at 13a. Accordingly, the court reasoned, "it is no longer appropriate to view § 107's remedies exclusively through a § 113 prism." *Id.* at 13a-14a. In light of *Cooper Industries*, therefore, the court revisited the availability of a cause of action under Section 107(a). *Id.* at 13a-14a.

The court of appeals first held that Section 107(a)(1)-(4)(B) provided a PRP with an express right of cost recovery against another PRP. App., *infra*, 14a-15a. In so doing, the court relied heavily on the Second Circuit's decision in *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90 (2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006). The court reasoned that Section 107(a)(1)-(4)(B) applied "[o]n its face," because respondent was a "person" under CERCLA and had incurred "necessary costs of response." App., *infra*, 14a. The court recognized that "§ 107 allows 100% cost recovery," but asserted that, "[i]f a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f)." *Id.* at 15a. Moreover, the court noted, without elabora-

tion, that "[t]his right is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107." *Id.* at 14a.

The court of appeals held, in the alternative, that "a right to contribution may be fairly implied from the text of [§] 107(a)(4)(B)." App., *infra*, 15a. The court rejected the argument that, "in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107." *Id.* at 16a. The court reasoned that, "if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would have done so explicitly." *Id.* at 16a-17a.

In the court of appeals' view, a contrary holding would "result[] in an absurd and unjust outcome," because "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." App., *infra*, 18a. Congress, the court concluded, "did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

In the wake of this Court's decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), there is a clear conflict among the courts of appeals on the question left open in that case: *i.e.*, whether a potentially responsible party can pursue an action against another PRP under Section 107(a). Moreover, the court of appeals' decision in this case, holding that a PRP can bring suit under Section 107(a), is contrary to the text

and structure of the statute and would create perverse incentives for PRPs not to enter into settlements with the government. Because the question presented is important, recurring, and ripe for resolution by this Court, the petition should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

1. Since this Court's decision in *Cooper Industries*, three courts of appeals have addressed the availability of a cause of action by one PRP against another PRP under Section 107(a). The decision below is consistent with the Second Circuit's decision in *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90 (2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006), but is in direct conflict with the Third Circuit's decision in *E.I. DuPont de Nemours & Co.* v. *United States*, 460 F.3d 515 (2006), petition for rehearing pending, No. 04-2096 (filed Oct. 13, 2006).

a. In *Consolidated Edison*, one PRP sued another PRP under Section 113(f)(1) to recover costs that it had incurred and would incur in cleaning up contamination at the sites of manufactured gas plants. 423 F.3d at 93-94. After this Court's *Cooper Industries* decision made clear that Section 113(f)(1) was inapplicable, the plaintiff PRP argued that it could bring suit under Section 113(f)(3)(B) instead, because it had entered into a "Voluntary Cleanup Agreement" with the New York State Department of Environmental Conservation. *Id.* at 95. The Second Circuit held that the PRP was not entitled to invoke Section 113(f)(3)(B) because the agreement could not "be construed to have resolved [the PRP's] CERCLA liability." *Id.* at 97.

Although the plaintiff PRP had not asserted that it could sue under Section 107, and indeed had "appear[ed] willing to accept * * * that section 107(a) may never provide a right of action for a [PRP]," 423 F.3d at 99, the Second Circuit *sua sponte* addressed that question and held that the plaintiff PRP could bring suit under Section 107(a). *Id.* at 97-103. The court acknowledged that it, like other courts of appeals, had previously held that a PRP could not bring an action against another PRP for cost recovery under Section 107(a) but was instead limited to an action for contribution under Section 113(f). *Id.* at 98-99 (citing *Bedford Affiliates* v. *Sills*, 156 F.3d 416 (2d Cir. 1998)). But the court concluded that its earlier decision (which "h[e]ld that a potentially responsible person * * * cannot maintain a § 107(a) action against another potentially responsible person," *Bedford Affiliates*, 156 F.3d at 425) had arisen in a different factual setting and could have been decided without resolving that question. 423 F.3d at 99-102.

Having addressed that precedent, the Second Circuit held that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily." 423 F.3d at 100. According to the court, "determining whether [such] a party * * * may sue under section 107(a) is easily resolved based on that section's plain language." *Id.* at 99. The court reasoned that, under Section 107(a), "[t]he only questions we must answer are whether [the PRP] is a 'person' and whether it has incurred 'costs of response.'" *Ibid.* "Unlike some other courts," the court continued, "we find no basis for reading into [Section 107(a)] a distinction between so-called 'innocent' parties and [PRPs]." *Ibid.* The court

stated that "Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing." *Id.* at 100.[3]

The Second Circuit added that, in its view, a contrary reading of Section 107(a) would "impermissibly discourag[e] voluntary cleanup." 423 F.3d at 100. According to the court, "[t]his would undercut one of CERCLA's main goals." *Ibid.*

b. By contrast, in *DuPont*, *supra*, the Third Circuit expressly rejected the approaches of the Second Circuit in *Consolidated Edison* and of the court of appeals in this case (which heavily relied on *Consolidated Edison*) and held that a PRP cannot bring suit against another PRP under Section 107(a). In *DuPont*, various PRPs sued the United States (as a PRP), seeking to recover costs for the cleanup of multiple sites nationwide. 460 F.3d at 525. Like the Second Circuit in *Consolidated Edison*, the Third Circuit began by recognizing that it had previously held that a PRP could not bring an action against another PRP for cost recovery under Section 107(a). 460 F.3d at 528 (citing *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997), and *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997)). Unlike the Second Circuit, however, the Third Circuit did not view its earlier cases as distinguishable. *Id.* at

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[3] With regard to the concern that a PRP suing under Section 107(a) would be entitled to joint and several liability, the court observed that "there appears to be no bar precluding a person sued under section 107(a) from bringing a counterclaim under section 113(f)(1) for offsetting contribution against the plaintiff volunteer [PRP]." 423 F.3d at 100 n.9.

530-531. The court also determined that "no intervening authority provides a basis sufficient to reconsider those precedents." *Id.* at 528. The court reasoned that the Supreme Court's decision in *Cooper Industries* "did not explicitly or implicitly overrule our precedents" but instead "expressly declined to consider the very questions at issue here." *Id.* at 532.

The Third Circuit rejected the argument that a rule precluding one PRP from suing another under Section 107(a) would be "in direct opposition to CERCLA's broad remedial purpose." 460 F.3d at 533. The court observed that, "[w]hile it is clear that CERCLA's drafters intended common law principles to govern liability, we have not found evidence in the legislative history that Congress contemplated this would extend a contribution right to PRPs engaged in entirely voluntary cleanups." *Id.* at 535. Moreover, the court noted, "SARA's legislative history * * * reveals an express bent toward encouraging settlements." *Id.* at 536. The court concluded that "SARA's settlement scheme is inconsistent with * * * a right" to recover costs for a voluntary cleanup. *Id.* at 538. Instead, the court reasoned, "Congress intended to allow contribution for settling or sued PRPs as a way to encourage them to admit their liability, settle with the Government, and begin expeditious cleanup operations pursuant to a consent decree or other agreement." *Id.* at 541.

The Third Circuit acknowledged that "it could be that encouraging *sua sponte* voluntary cleanups by capable PRPs is in the public's interest, and would be a better way to protect health and the environment than pressuring them into settlement agreements." 460 F.3d at 542. The court reasoned, however, that "[t]his is not self-evident." *Id.* at 542-543. Instead, the court con-

cluded, "the debate over whether our national environmental cleanup laws should favor prompt and effective cleanups in any manner * * * or should favor settlements and other enforcement actions * * * is a matter for Congress, not our Court." *Id.* at 543.[4]

2. The court of appeals' decision in this case also conflicts with numerous pre-*Cooper Industries* decisions from other courts of appeals. See p. 5, note 2, *supra*. In those cases, the courts held that one PRP could not bring actions against another under Section 107(a) in various circumstances in which the plaintiff PRP could not avail itself of Section 113(f), including (1) where (as here) the PRP had not yet been sued under either Section 106 or Section 107(a) (and was therefore seeking to recover the costs of a voluntary cleanup), see, *e.g.*, *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301-1306 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); (2) where the PRP had failed to bring a Section 113(f) contribution action within the applicable limitations period, see, *e.g.*, *United Techs. Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 101 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); and (3) where the PRP could not sue the defendant PRP under Section 113(f) because the defendant PRP had reached a settlement with the government, see, *e.g.*, *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

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[4] Judge Sloviter dissented. She noted that "[t]wo of our sister circuits have recently considered the same issue presented here and both have decided, contrary to the majority, that section 107(a) can be used by a responsible party to seek contribution from another responsible party." 460 F.3d at 547.

Although those decisions arise in various factual contexts, many of them state their holdings in broad terms that categorically foreclose a PRP from bringing an action against another PRP for cost recovery under Section 107(a). See, *e.g.*, *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.) (noting that "section [113] must be used by parties who are themselves potentially responsible parties"), cert. denied, 525 U.S. 963 (1998); *New Castle County*, 111 F.3d at 1120 (stating that "[a]n action brought by a potentially responsible person is by necessity a Section 113 action for contribution"); *Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997) (reasoning that, "when two parties who both injured the property have a dispute about who pays how much—a derivative liability, apportionment dispute—the statute directs them to § 113(f) and only to § 113(f)"). To be sure, the recent decisions of the Second and Eighth Circuits demonstrate the capacity of courts of appeals to revisit their precedents after *Cooper Industries*. Nevertheless, other courts may follow the Third Circuit's lead and reaffirm their pre-*Cooper Industries* precedents. In either event, those precedents underscore the need for this Court to provide clarification on the question presented.

As matters currently stand, therefore, a PRP may bring a Section 107(a) action against another PRP for cost recovery in the Second and Eighth Circuits, but is foreclosed from doing so in the Third Circuit and appears to be foreclosed from doing so in as many as seven other circuits. See p. 5, note 2, *supra*. The Court's intervention is warranted to resolve this clear and direct circuit conflict.

B. The Decision Below Is Incorrect

The court of appeals erred by holding that one PRP could bring an action against another PRP under Section 107(a).

1. Section 107(a) does not authorize one PRP to sue another. The relevant language in that section provides that PRPs—*i.e.*, the universe of persons who fall into the four categories enumerated in Section 107(a)(1)-(4)—shall be liable for "any other necessary costs of response incurred *by any other person* consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B) (emphasis added). That passively worded provision "impliedly authorizes suit" by "any other person" against PRPs. *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 (1994); but see *id.* at 822 (Scalia, J., dissenting in part) (characterizing provision as creating an express cause of action). The most natural reading of the phrase "any *other* person" is that it excludes the persons who are the subject of the sentence: *i.e.*, PRPs. Cf. *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 342-343 & n.3 (2005) (holding that statutory phrase "another country" excluded countries listed in previous clauses, on ground that "both 'other' and 'another' are just as likely to be words of *differentiation* as they are to be words of connection").[5] Such a reading of the statute does not strip Section 107(a)(1)-(4)(B) of operative effect, because it

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[5] The court of appeals correctly noted (App., *infra*, 14a) that a PRP constitutes a "person" for purposes of CERCLA. See CERCLA § 101(21), 42 U.S.C. 9601(21). The relevant inquiry, however, is not simply whether a PRP qualifies as a "person," but whether it qualifies as "any other person," and thus an eligible plaintiff, under Section 107(a)(1)-(4)(B).

still provides a cause of action for persons *other* than PRPs, namely, "innocent" private parties who have incurred the requisite costs. See *New Castle County*, 111 F.3d at 1120; *United Technologies*, 33 F.3d at 99-100. Under that reading, however, Section 107(a)(1)-(4)(B) does not authorize PRPs to sue each other for cost recovery.[6]

The court of appeals seemingly suggested (App., *infra*, 15a) that Section 107 more generally contains an implied right to contribution. As a preliminary matter, it is "debatable" whether Section 107 contains an implied right of contribution at all. *Cooper Industries*, 543 U.S. at 162; see, *e.g.*, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638-647 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90-99 (1981); see generally *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one

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[6] At one point, the court of appeals suggested that "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" App., *infra*, 14a. That suggestion lacks merit. To be sure, the preceding subparagraph of Section 107(a) provides a parallel cause of action for those enumerated governmental entities against PRPs. See CERCLA § 107(a)(1)-(4)(A), 42 U.S.C. 9607(a)(1)-(4)(A). It does not follow, however, that the phrase "any other person" in Section 107(a)(1)-(4)(B) was intended merely to exclude those entities (as opposed to PRPs generally) from asserting a claim under that subparagraph. To the contrary, other operative language in Section 107(a)(1)-(4)(B)—namely, its reference to "other necessary costs" (*i.e.*, costs other than the costs specified in Section 107(a)(1)-(4)(A), see, *e.g.*, *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986))—ensures that those governmental entities can recover only under Section 107(a)(1)-(4)(A) and are precluded from recovering under Section 107(a)(1)-(4)(B). Thus, far from giving meaning to the phrase "any other person" in Section 107(a)(1)-(4)(B), the court of appeals' interpretation in fact renders it entirely superfluous.

method of enforcing a substantive rule suggests that Congress intended to preclude others."). Even if an implied right to contribution did exist, however, it would not help respondent, because Section 107 would at most contain an implied right to "contribution" in its "traditional sense": *i.e.*, a claim by one party to recover an amount from a jointly liable party after the first party has extinguished a disproportionate share of their common liability to a third party. *United Technologies*, 33 F.3d at 99; see, *e.g.*, *Northwest Airlines*, 451 U.S. at 87-88 ("Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability."); *Black's Law Dictionary* 297 (5th ed. 1979) ("Under principle of 'contribution,' a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff."). In this case, respondent is not seeking "contribution" as that term is traditionally defined, but is instead seeking to recover costs from a voluntary cleanup. Nothing in any provision of Section 107 suggests an implied right to "contribution" in such a broader and all-encompassing sense.[7]

2. Even assuming that Section 107(a), standing on its own, could be construed to confer on a PRP a cause of action against another PRP for cost recovery, that provision must be read in light of Section 113(f), which provides a PRP with an express cause of action against another in two specific circumstances: (1) where the

[7] The same would be true with regard to any right to contribution that might exist as a matter of federal common law. See App., *infra*, 17a n.9 (leaving open existence of such a right).

PRP is seeking contribution "during or following any civil action" under Section 106 or Section 107(a), see CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1); or (2) where the PRP is seeking contribution after entering into an administrative or judicially approved settlement with the government, see CERCLA § 113(f)(3)(B), 42 U.S.C. 9613(f)(3)(B). The better view is that the subsequently enacted Section 113(f) specifies the exclusive circumstances in which one PRP may bring suit against another under CERCLA. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) (explaining that "the implications of a statute may be altered by the implications of a later statute").

Were that not true, a PRP could readily circumvent the various limitations on an action under Section 113(f) simply by pursuing an action under Section 107(a), thereby rendering Section 113(f) effectively superfluous. See, *e.g.*, *New Castle County*, 111 F.3d at 1122-1123; *Colorado & E.R.R.*, 50 F.3d at 1536; *United Technologies*, 33 F.3d at 101. Thus, a PRP that was outside the three-year limitations period for an action under Section 113(f), see CERCLA § 113(g)(3), 42 U.S.C. 9613(g)(3), could take advantage of the typically more generous limitations period for an action under Section 107(a), see CERCLA § 113(g)(2), 42 U.S.C. 9613(g)(2). And a PRP that wished to sue another PRP that had itself reached a settlement with the government (and thus could not be sued under Section 113(f)), see CERCLA § 113(f)(2) and (f)(3)(B), 42 U.S.C. 9613(f)(2) and (f)(3)(B), could simply sue that PRP under Section 107(a), which contains no analogous limitation on a settling PRP's liability in an action for cost recovery. Similarly, there is no justification for permitting a PRP to circumvent Section 113(f)'s express limitation on bringing suit *before* an action un-

der Section 106 or Section 107(a) is commenced (or a settlement is reached), see CERCLA § 113(f)(1) and (f)(3)(B), 42 U.S.C. 9613(f)(1) and (f)(3)(B); *Cooper Industries*, 543 U.S. at 168, simply by pursuing an action under Section 107(a) itself. Such an interpretation would "violate the settled rule that [courts] must, if possible, construe a statute to give every word some operative effect." *Id.* at 167.[8]

The savings clause in Section 113(f)(1) does not dictate a different result. That clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106 or Section 107]." That clause, however, saves only actions for "contribution"—and there is no reason to think that the savings clause uses the term "contribution" in anything other than its common-law sense. See, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (noting that, "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to

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[8] The court of appeals acknowledged that the latter form of circumvention was permissible under its reading of the statute. See App., *infra*, 14a (noting that the right to sue under Section 107 "is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107"); cf. *Consolidated Edison*, 423 F.3d at 100 (holding that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily"). The court of appeals stated in dictum (App., *infra*, 17a) that PRPs who *do* have a right to seek contribution under Section 113(f) would be relegated to that provision as their exclusive remedy, but offered no justification for that *ipse dixit*—which would in any event leave all other PRPs free to evade the strictures of Section 113(f).

incorporate the established meaning of these terms") (citations and internal quotation marks omitted). If the savings clause were read to apply even to such cost-recovery actions (and assuming *arguendo* that Section 107(a) initially permitted such actions), it would enable a PRP, notwithstanding the language of Section 113(f)(1), to bring suit even *before* an action under Section 106 or Section 107(a) is commenced—in contravention of the rule that a savings clause should not be interpreted to nullify operative language in the same statute in which it is contained. See, *e.g.*, *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998). Instead, the savings clause merely preserves the ability of a PRP to bring an action for contribution (as that term is traditionally defined) under any other provision of law, including state law. See, *e.g.*, *Atherton* v. *FDIC*, 519 U.S. 213, 227-228 (1997).

The legislative history of SARA, which added Section 113(f) to CERCLA, further supports the conclusion that a PRP may not bring an action against another PRP for cost recovery under Section 107(a). For example, the House Committee on Energy and Commerce stated that Section 113(f) "does not affect the right of the *United States* to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site." H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 79-80 (1985) (emphasis added). The implication of that statement is either that the Committee was operating on the assumption that a private PRP was not entitled to "maintain a cause of action for cost recovery under Section 107" in the first place, or that the Committee did not believe

that any such cause of action would survive the enactment of Section 113(f).[9]

3. Allowing a PRP to pursue an action against another PRP under Section 107(a) would undermine CERCLA's settlement scheme. Under that scheme, the government has "obvious and important leverage to encourage quick and effective resolution of environmental disputes." *Reading Co.*, 115 F.3d at 1119. A PRP has considerable incentive to enter into a settlement with the government, because, if it does, it will enjoy protection from contribution while securing the ability to seek contribution itself from non-settling PRPs. If it does not, on the other hand, it will be unable to seek contribution from other PRPs and may face the prospect of potentially disproportionate liability.

If the court of appeals' rule is upheld, however, a PRP that has not yet been sued under Section 106 or Section 107(a) might be well advised to *refuse* to settle with the government, in order to preserve its right to sue other PRPs under Section 107(a) and thereby take advantage of the substantially more generous provisions applicable to such an action. For example, whereas a PRP suing another PRP under Section 113(f) is limited to recovering that PRP's equitable share of its costs, see, *e.g.*, *Elementis Chromium L.P.* v. *Coastal States*

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[9] Consistent with that legislative history, courts have recognized that, notwithstanding Section 113(f), the United States retains the right to enforce CERCLA through either Section 106 or Section 107(a) even when it also happens to be a PRP (and therefore may be liable for at least some cleanup costs). *See, e.g.*, *United States* v. *Monsanto Co.*, 858 F.2d 160, 164 & n.2, 173 & n.28 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *United States* v. *Chrysler Corp.*, 157 F. Supp. 2d 849, 859-861 (N.D. Ohio 2001); *United States* v. *Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991).

Petroleum Co., 450 F.3d 607, 612-613 (5th Cir. 2006), a PRP suing another PRP for cost recovery under Section 107(a) would potentially be entitled to proceed on a theory of joint and several liability to recover *all* of its costs, see App., *infra*, 14a-15a; *Consolidated Edison*, 423 F.3d at 100 n.9, thereby placing the burden on the other PRP to pursue (1) any defense of divisibility or (2) any counterclaim for contribution (or claims for contribution against other available, non-settling PRPs) under Section 113(f).

A PRP could seemingly also bring an action for cost recovery under Section 107(a) against another PRP that had itself reached a settlement with the government, notwithstanding the protective shield that Congress adopted to encourage such settlements in Section 113(f)(2) (which, by its terms, applies only to claims for "contribution"). Conversely, a PRP might have a disincentive to settle with the government insofar as it thought that it might be the object of *another* PRP's action for cost recovery under Section 107(a), because the PRP would seemingly not be able to use any settlement as a defense against such an action. Allowing PRPs to bring actions for cost recovery under Section 107 would thus weaken the effectiveness of Section 113(f)'s settlement provisions and thereby compromise the government's ability to bring closure to CERCLA cleanups.

4. In *Consolidated Edison*, the Second Circuit reasoned that a reading of Section 107(a) that precluded one PRP from bringing an action against another for cost recovery would "impermissibly discourag[e] voluntary cleanup," in contravention of "one of CERCLA's main goals." 423 F.3d at 100; see App., *infra*, 18a (stating that the court of appeals' holding in this case was

"consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites"). Given the clear meaning of the text of the statute, however, "there is no need * * * to consult the purpose of CERCLA at all." *Cooper Industries*, 543 U.S. at 167. In any event, as the Third Circuit explained at length in *DuPont*, there is little evidence that, in enacting CERCLA and SARA, Congress intended to promote *sua sponte* cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit—and, in fact, there is ample support for the contrary view. See 460 F.3d at 533-543.

Moreover, contrary to the Second Circuit's assumption, the inability of one PRP to bring an action against another for cost recovery under Section 107(a) may not affect a PRP's incentives to engage in a voluntary cleanup, at least where a cleanup by the current property owner would enhance the value of a property to such an extent that the absence of an action for cost recovery would not be a meaningful deterrent. In sum, it is not clear that policy considerations support the court of appeals' rule in this case, but even if they did, such considerations could not overcome the text and structure of the statute, which make clear that Section 113(f) provides the exclusive mechanisms by which one PRP can sue another under CERCLA.[10]

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[10] The court of appeals in this case relied on an additional policy consideration: namely, that, if one PRP were foreclosed from suing another under Section 107(a), "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." App., *infra*, 18a. There is no empirical basis for that concern. See *DuPont*, 460 F.3d at 541 n.31. To the contrary, the government has not previously hesitated to bring suit, or enter into settlements, even when

C. The Question Presented Is Important And Warrants Review At This Time

The question whether a PRP can bring an action against another PRP under Section 107(a) is a recurring one of great importance to the operation of CERCLA. In addition to the many courts of appeals that had addressed various aspects of that question before this Court decided *Cooper Industries*, see p. 5, note 2, *supra*, three courts of appeals have now passed on the question since that decision, and at least two other courts of appeals are considering the question in pending cases.[11] Moreover, numerous district courts have also addressed the question, with conflicting results.[12]

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it may lead to the imposition of substantial liability on federal PRPs. See, *e.g.*, *United States* v. *Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), cert. denied, 537 U.S. 1147 (2003); *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir.), cert. denied, 515 U.S. 1158 (1995); *Coeur d'Alene Tribe* v. *Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003); 69 Fed. Reg. 67,607 (2004); 69 Fed. Reg. 51,326 (2004); 67 Fed. Reg. 8557 (2002). And the court of appeals overlooked the fact that enforcement actions by state or tribal authorities or "innocent" private parties (or settlement agreements with state authorities) can also trigger a right to seek contribution under Section 113(f)(1) or (3).

[11] See *Metropolitan Water Reclamation Dist.* v. *North American Galvanizing & Coatings, Inc.*, No. 05-3299 (7th Cir. argued Jan. 20, 2006); *Goodrich Corp.* v. *County of San Bernardino*, No. 05-56694 (9th Cir.).

[12] Compare, *e.g.*, *City of Bangor* v. *Citizens Commc'ns Co.*, 437 F. Supp. 2d 180, 222-223 (D. Me. 2006); *Raytheon Aircraft Co.* v. *United States*, 435 F. Supp. 2d 1136, 1145-1150 (D. Kan. 2006); *Sunnyside Dev. Corp., LLC* v. *Opsys U.S. Corp.*, No. C 05-01447 SI, 2006 WL 1128039, at *2 (N.D. Cal. Apr. 27, 2006); *Ferguson* v. *Arcata Redwood Co., LLC*, No. C 03-05632 SI, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 2, 2005); *Kotrous* v. *Goss-Jewett Co. of N. Cal., Inc.*, No. Civ. S02-1520 FCD JFM, 2005 WL 1417152, at *3-*4 (E.D. Cal. June 16, 2005); *Viacom*,

This Court need not await further percolation in the lower courts before deciding the question presented. That question is cleanly presented in this case; the opinions of the three courts of appeals to have decided the issue post-*Cooper Industries* contain extensive discussions of the arguments on both sides; and, in light of the post-*Cooper Industries* division of authority in the lower courts, it is unlikely that those courts will reach consensus on the appropriate resolution of the question. Moreover, the continued uncertainty concerning the availability of an action for cost recovery under Section 107(a) is resulting in the significant expenditure of judicial and party resources, especially given the complex and time-consuming nature of CERCLA litigation. In some cases, it appears that such uncertainty may be deterring PRPs from entering into settlements with the government. And in those jurisdictions that have recognized the availability of Section 107(a) actions, courts and litigants are devoting substantial resources to the litigation of claims that may ultimately prove to be unavailable. The

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Inc. v. *United States*, 404 F. Supp. 2d 3, 6-9 (D.D.C. 2005); and *Vine Street LLC* v. *Keeling*, 362 F. Supp. 2d 754, 760-764 (E.D. Tex. 2005) (all allowing PRPs to sue under Section 107(a)), with *Aviall Servs., Inc.* v. *Cooper Indus., LLC*, No. 3:97-CV-1926-D, 2006 WL 2263305, at *3-*10 (N.D. Tex. Aug. 8, 2006); *R.E. Goodson Constr. Co.* v. *International Paper Co.*, No. C/A 4:02-4184-RBH, 2005 WL 2614927, at *5-*6, *8 (D.S.C. Oct. 13, 2005); *Montville Twp.* v. *Woodmont Builders, LLC*, No. Civ. A. 03-280 DRD, 2005 WL 2000204, at *3 (D.N.J. Aug. 17, 2005); *Boarhead Farm Agreement* v. *Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 435 (E.D. Pa. 2005); *City of Waukesha* v. *Viacom Int'l, Inc.*, 362 F. Supp. 2d 1025, 1027-1028 (E.D. Wis. 2005); *Mercury Mall Assocs., Inc.* v. *Nick's Mkt., Inc.*, 368 F. Supp. 2d 513, 519-520 (E.D. Va. 2005) (all foreclosing PRPs from suing under Section 107(a)).

Court's intervention is warranted now in order to provide definitive resolution on this important question concerning the remedies available under CERCLA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3152

ATLANTIC RESEARCH CORP., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Submitted: Mar. 16, 2006
Filed: Aug. 11, 2006

Before WOLLMAN and RILEY, Circuit Judges, and ROSENBAUM,[1] District Judge.

ROSENBAUM, District Judge.

Atlantic Research Corporation ("Atlantic") seeks partial reimbursement from the United States for costs incurred in an environmental cleanup. Atlantic's claim is based on the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (2005), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, 1615. The issue for consideration is whether CERCLA forbids a

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[1] The Honorable James M. Rosenbaum, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

party such as Atlantic, which has voluntarily cleaned up a site for which it was only partly responsible, to recover part of its cleanup costs from another liable party.[2] For the reasons that follow, we hold that CERCLA § 107 permits such a cause of action.

I. Background

Atlantic retrofitted rocket motors for the United States from 1981 through 1986. It performed this service at its Camden, Arkansas, facility. The work included using high-pressure water spray to remove rocket propellant. Once removed, the propellant was burned. Residue from burnt rocket fuel contaminated the Arkansas site's soil and groundwater.

Atlantic voluntarily investigated and cleaned up the contamination, incurring costs in the process. It sought to recover a portion of these costs from the United States by invoking CERCLA §§ 107(a) and 113(f).[3] Atlantic and the government began to negotiate in an effort to resolve these financial matters.

The negotiations ended with the United States Supreme Court decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L.Ed.2d 548 (2004) ("*Aviall*"). In *Aviall*, the court found a party could only attempt to obtain § 113(f) contribution "during or following" a §§ 106 or 107(a) CERCLA civil

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[2] The district court dismissed this matter on the government's Rule 12(b)(6) motion. As such, the court assumed the facts most favorably to Atlantic, the non-moving party. We do the same; and therefore, assume, but do not decide, that the United States would be liable under CERCLA.

[3] These sections have been codified at 42 U.S.C. §§ 9607(a) and 9613(f). For convenience, this Opinion refers to the statute sections as designated in CERCLA, rather than as later codified.

action. *Id.* at 161, 125 S. Ct. at 580. As no action had been commenced against Atlantic under either §§ 106 or 107(a), the *Aviall* decision barred its § 113(f) contribution claim.

With its § 113(f) claim *Aviall*-foreclosed, Atlantic amended its complaint. The amended complaint relied solely on § 107(a) and federal common law. In lieu of answer, the government moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing this Court's pre-*Aviall* decision in *Dico., Inc.* v. *Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003) ("*Dico*") foreclosed Atlantic's § 107 claim. The district court agreed. Atlantic appeals.

As will be discussed in more detail below, *Dico* held that a liable party could not bring an action under § 107. *Dico*, 340 F.3d at 531. We recognize the generally preclusive effect of a previous panel's ruling. *United States* v. *Blahowski*, 324 F.3d 592, 596-97 (8th Cir. 2003). But this rule is not inflexible. Where the prior decision can be distinguished, or its rationale has been undermined, a subsequent decision can depart from the prior path.[4] We are convinced *Dico* is such a case; it is clearly distinguishable from the case at bar, and its analytic is undermined by *Aviall*.

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[4] "[I]t is well settled that a panel may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent." *T.L.* v. *United States*, 443 F.3d 956, 960 (8th Cir. 2006), *citing Young* v. *Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). As will be seen, while *Aviall* has undermined *Dico's* reasoning for parties in Atlantic's position, its holding remains viable for those parties which still have recourse to relief under § 113. Accordingly, *Dico* can be reconciled with our present holding and we need not ultimately answer whether *Aviall* compels reconsideration of *Dico*.

II. Analysis

As this case turns on the interpretation of CERCLA, a federal statute, our review is de novo. *Iowa 80 Group, Inc.* v. *Internal Revenue Service*, 406 F.3d 950, 952 (8th Cir. 2005). We undertake this review, recognizing our obligation to effectuate the intent of Congress when interpreting federal statutes. *Id.* To resolve the question before us, we must briefly review the intertwined history of CERCLA §§ 107 and 113, and then analyze this history in light of *Aviall*.

A. CERCLA Cost Recovery and Contribution—Pre-*Aviall*

CERCLA is Congress's monumental attempt to "encourage the timely cleanup of hazardous waste sites," and "place the cost of that response on those responsible for creating or maintaining the hazardous condition." *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935-36 (8th Cir. 1995) (internal quotations and citations omitted). To achieve these ends, CERCLA effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others. *See* Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 Wake Forest L. Rev. 903 (2004); Ronald G. Aronovsky, *Federalism & CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 Ecology L.Q. 1, 9 (2006).

When the federal or a state government conducts the cleanup, CERCLA permits the sovereign to recover its costs from whomever is liable for the contamination. § 107(a)(4)(A). CERCLA also provides three methods

by which private parties may recover cleanup costs. The first is found at § 107(a)(4)(B), a part of the original statute in 1980. Congress added the others, §§ 113(f)(1) and 113(f)(3)(B), as part of SARA.[5]

Sections 107(a) and 113(f)(1) are central to our analysis. The Eighth, and many of its sister Circuits, have previously held that liable parties seeking reimbursement must use § 113(f)(1), and may not use § 107 for that purpose. Today, we consider whether this ruling remains viable in the post-*Aviall* world.

CERCLA's § 107(a) provides that "covered persons," which we will call "liable parties,"[6] are liable for, among other things:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

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[5] The last of these, § 113(f)(3)(B), concerns the rights of settling parties. As the parties in this case have obviously not reached a settlement, § 113(f)(3)(B) is not examined here.

[6] Many prior opinions have called these "potentially responsible parties" (abbreviated "PRP"). We decline to use this term. The PRP term has been developed by the courts. It is not found in CERCLA. The term refers to "a party who may be covered by the statute at the time the party is sued under the statute." *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 773 n.2 (4th Cir. 1998). After *Aviall*, the term has been weakened and "may be read to confer on a party that has not been held liable a legal status that it should not bear." *Consolidated Edison Co.* v. *UGI Utils., Inc.*, 423 F.3d 90, 98 n.8 (2d Cir. 2005).

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]

107(a)(4)(A), (B). Courts have found in CERCLA's reference to "any other necessary costs of response" and "any other person," authority to allow private suits under 107(a)(4)(B). *See Walls* v. *Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (collecting cases).

Section 113 contains a subsection entitled "Contribution," the first part of which states:

> Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action under [§§ 106 or 107(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§§ 106 or 107].

§ 113(f)(1).

There is some similarity in the remedial responsibilities borne by liable parties under §§ 107(a) and 113(f). The Supreme Court has termed these sections' remedies "similar and somewhat overlapping," yet "clearly distinct." *Compare Key Tronic Corp.* v. *United States*, 511 U.S. 809, 816, 114 S. Ct. 1960, 1966, 128 L. Ed. 2d 797 (1994) *with Aviall*, 543 U.S. at 163 n.3, 125 S. Ct. at 582

n.3. Each requires proof of the same elements. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996). They differ, however, in procedure and scope.

1. Section 107(a) Remedies

Section 107(a) has a six-year statute of limitations, and allows a plaintiff to recover 100% of its response costs from all liable parties, including those which have settled their CERCLA liability with the government. §113(g)(2), 107(a). Prior to SARA's enactment, some courts implied a right to contribution from § 107, *see Mardan Corp.* v. *C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986) (collecting cases), or as a matter of federal common law. *United States* v. *New Castle County*, 642 F. Supp. 1258, 1265-66 (D. Del. 1986). The right initially was thought to be uncertain in light of the Supreme Court's traditional reluctance to imply rights of action in the context of other statutes. *See, e.g., Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639-40, 101 S. Ct. 2061, 2066, 68 L. Ed. 2d 500 (1981) (declining to imply an antitrust right of action for contribution).

2. Section 113 Remedies

Congress resolved the uncertainty when enacting SARA in 1986 by adding § 113 to "clarif[y] and confirm" a right to CERCLA contribution. *United Technologies Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994), citing S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985). Section 113's explicit right to contribution is more restricted than that afforded by 107. Section 113's right is subject to a three-year statute of limitations; plaintiffs can recover only costs in excess of

their equitable share, and may not recover from previously-settling parties. § 113(f)(1), (f)(2), (g)(3).

3. The Section 107(a)/Section 113 Conflict—Pre-*Aviall*

Congress's addition of § 113 posed a dilemma. Courts saw that CERCLA, as amended, created a situation where litigants might "quickly abandon section 113 in favor of the substantially more generous provisions of section 107," thus rendering § 113 a nullity. *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997).

To prevent § 107 from swallowing § 113, courts began directing traffic between the sections. *See id.*; *United Techns.*, 33 F.3d at 101; *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 424 (2d Cir. 1998). As a result, regardless of which CERCLA section a plaintiff invoked, courts typically analyzed §§ 107 and 113 together, aiming to distinguish one from the other. *See Bedford Affiliates*, 156 F.3d at 424; *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 347 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301-02 (9th Cir. 1997); *New Castle County*, 111 F.3d at 1121-22; *Redwing Carriers*, 94 F.3d 1489, 1513 (11th Cir. 1996); *United States* v. *Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1534-35 (10th Cir. 1995); *United Techns.*, 33 F.3d at 99; *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

Traffic-directing dramatically narrowed § 107 by judicial fiat. On its face, § 107(a)(4)(B) is available to "any . . . person" other than the sovereigns listed in § 107(a)(4)(A). *See Control Data Corp.*, 53 F.3d at 936

n.9. In practice, however, courts gradually steered liable parties away from § 107 and required them to use § 113; § 107 was reserved for "innocent" plaintiffs who could assert one of the statutory defenses to liability. *See Bedford Affiliates*, 156 F.3d at 424; *Pinal Creek*, 118 F.3d at 1301; *New Castle County*, 111 F.3d at 1124; *Redwing Carriers*, 94 F.3d at 1496; *Centerior Service*, 153 F.3d at 349; *United Techns.*, 33 F.3d at 100; *Akzo Coatings*, 30 F.3d at 764-65. This cramped reading of § 107 prevented liable parties from using it to evade § 113's Congressionally-mandated constraints, thus preserving the vitality of § 113. *See New Castle County*, 111 F.3d at 1121; *Colo. & Eastern*, 50 F.3d at 1538; *United Techns.*, 33 F.3d at 98.

In the pre-*Aviall* analysis, § 113 was presumed to be available to all liable parties, including those which had not faced a CERCLA action. *See Akzo Coatings*, 30 F.3d at 763 n.4 (liable party's § 113 claim for costs voluntarily incurred held barred by settlement); *Pinal Creek*, 118 F.3d at 1306 (liable party's claim for costs voluntarily incurred governed by both §§ 107 and 113). Accordingly, most courts concluded liable parties could not use § 107. *See Pneumo Abex*, 142 F.3d at 776 (collecting cases); *but see Pinal Creek*, 118 F.3d at 1302 (holding liable parties could not seek direct recovery under § 107, but that § 107 implicitly incorporates a claim for contribution" which remains available to liable parties through combined operation of both sections); *United Techns.*, 33 F.3d at 99 n.8 (suggesting, in dicta, that a liable party may bring contribution action under § 107).

Our opinion in *Dico* was the last in this pre-*Aviall* line. The Environmental Protection Agency ("EPA") had forced Dico, Inc., and another party to clean up an

Iowa site which both had contaminated. Dico sued the other party, seeking direct recovery of 100% of its costs under § 107 and for contribution under § 113. The other party settled with the EPA and moved for summary judgment in Dico's lawsuit. The district court granted the motion. It found Dico's § 113 claims were barred by the settlement and, as a liable party, Dico had no right to recover its full cleanup cost under § 107.

Dico appealed the dismissal of its § 107 claim, arguing the Supreme Court's opinion in *Key Tronic* allowed liable parties a claim in direct recovery. We disagreed, noting *Key Tronic* dealt with a pre-SARA implied right to § 107 contribution. *Dico*, 340 F.3d at 531. When we affirmed the dismissal, we joined other Circuits in narrowly construing § 107, and holding a liable party may only assert a contribution claim under § 113. *Id.* at 530, citing among others *Bedford Affiliates*, 156 F.3d at 424; *Centerior Service*, 153 F.3d at 350; *Pinal Creek*, 118 F.3d at 1306; *Redwing Carriers*, 94 F.3d at 1496; *Colorado & Eastern*, 50 F.3d at 1536; *United Techns.*, 33 F.3d at 101; *Akzo Coatings*, 30 F.3d at 764; and *Amoco Oil*, 889 F.2d at 672. We now see that *Aviall* undermines *Dico*, and the judge-created analytic upon which it relies.

B. The Effect of *Aviall*

Aviall's facts are similar to those at hand. Aviall Services, Inc., purchased contaminated aircraft maintenance sites from Cooper Industries. The Texas Natural Resource Conservation Commission directed Aviall's efforts at environmental cleanup, but neither the Commission, the EPA, nor any private party brought a CERCLA action against Aviall.

After the cleanup, Aviall sued Cooper for both cost recovery under § 107 and contribution under § 113. It later amended its complaint, seeking recovery only under § 113, assuming—based on Circuit precedent—that its § 107 rights would be preserved in the § 113 claim. The district court granted Cooper's motion for summary judgment, holding Aviall had no right to § 113 relief absent a prior §§ 106 or 107 CERCLA enforcement action, and that Aviall's amended complaint abandoned any potential § 107 claim. A Fifth Circuit panel's affirmance was reversed, en banc.

On certiorari, the Supreme Court reversed again. Justice Thomas, writing for a seven-member majority, construed § 113's "during or following" language. He said, "[t]he natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." *Aviall*, 543 U.S. at 165-66, 125 S. Ct. at 583. The Court found the words "during or following" established a condition precedent to a 113(f) claim. As such, a court which allowed a § 113 contribution claim, absent the prior §§ 106 or 107 action, would render § 113's precondition a nullity.

Having made this determination, the Court turned to its previous *Key Tronic* reference to CERCLA's "similar and somewhat overlapping" remedies. The Court explained that § 107's and 113's remedies were only "similar" in that "both allow private parties to recoup costs from other private parties." *Id.* at 163 n.3, 125 S. Ct. 577, 125 S. Ct. at 582 n.3. The Court carefully noted, however, that "the two remedies are clearly distinct." *Id.*

Dissenting Justices Ginsburg and Stevens analyzed *Key Tronic* differently. They said the *Key Tronic* court had not questioned whether § 107 afforded liable parties a cause of action against other liable parties. It simply disagreed whether the right was implied or explicit. *Id.* at 172, 125 S. Ct. at 586-87. Justices Ginsburg and Stevens did not agree that Aviall's amended complaint abandoned a § 107 claim, which they would have allowed to proceed. *Id.* at 174, 125 S. Ct. 577. The majority explicitly avoided this question, *see id.* at 173-74, 125 S. Ct. at 587-88, reserving it for another day.

C. The Matter At Hand

That day has arrived. We now ask: Can one liable party recover costs advanced, beyond its equitable share, from another liable party in direct recovery, or by § 107 contribution, or as a matter of federal common law?

The Second Circuit is the only Court which has considered this question since *Aviall*.[7] That Court revisited its pre-*Aviall* precedent, much as we have done here,

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[7] Pursuant to Federal Rule of Appellate Procedure 28(j), the United States has brought to our attention *Elementis Chromium L.P.* v. *Coastal States Petroleum Co.*, 450 F.3d 607 (5th Cir. 2006). In that case, the Fifth Circuit determined that the imposition of joint and several liability was inappropriate in a contribution claim under § 113. The Court cited *Redwing Carriers* for the proposition that " 'when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under 107(a),' and the imposition of joint and several liability is inappropriate." *Elementis Chromium*, 450 F.3d at 613. As we have noted, *Redwing Carriers* is an example of the judicial traffic-directing that narrowed the scope of § 107 prior to *Aviall*. Because the Fifth Circuit was not asked to construe § 107 in its opinion, we decline to afford this isolated quotation touching on § 107 the weight the government believes it deserves.

and concluded that § 107 allowed one liable party to recover voluntarily incurred response costs from another. *Consolidated Edison Co.* v. *UGI Utilities, Inc.*, 423 F.3d 90, 100 (2d Cir. 2005). In reaching this conclusion, the court distinguished its holding in *Bedford Affiliates*, which—like *Dico*—had rejected a liable party's direct recovery claim under § 107. *Id.* at 102.

In light of *Aviall's* holding that §§ 107 and 113's remedies are distinct, the Second Circuit held "it no longer makes sense" to view section 113(f)(1) as the exclusive route by which liable parties may recover cleanup costs. *See Consolidated Edison Co.*, 423 F.3d at 99. The court looked to Section 107(a)(4)(B)'s "any other person" language, and found "no basis for reading into this language a distinction between so-called 'innocent' parties and parties which, if sued, would be held liable under section 107(a)." *Id.* at 99. So saying, the Second Circuit reopened § 107 cost recovery to liable parties.

Our Court now stands at the same crossroad. We agree with our sister Circuit, and hold that it no longer makes sense to view § 113 as a liable party's exclusive remedy. This distinction may have made sense for parties such as Dico, which was allowed to seek contribution under § 113. But here, Atlantic is foreclosed from using § 113. This path is barred because Atlantic—like Aviall—commenced suit before, rather than "during or following," a CERCLA enforcement action. Atlantic has opted to rely upon § 107 to try to recover its cleanup costs exceeding its own equitable share. We conclude it may do so.

The Supreme Court emphasized that §§ 107 and 113 are "distinct." Accordingly, it is no longer appropriate to view § 107's remedies exclusively through a § 113

prism, as we did in *Dico,* and as the government requests. We reject an approach which categorically deprives a liable party of a § 107 remedy. Like the Second Circuit, we return to the text of CERCLA, and find no such limitation in Congress's words.

We have held that "any other person" means any person other than the statutorily enumerated "United States Government or a State or an Indian tribe." *Control Data Corporation,* 53 F.3d at 936 n.9. Atlantic is such a "person," *see* CERCLA § 101(G)(21); no one disputes its having incurred "necessary costs of response." On its face § 107 applies.

As the Second Circuit stated, "[e]ach of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances." *Consolidated Edison,* 423 F.3d at 99. Thus, a liable party may, under appropriate procedural circumstances, bring a cost recovery action under § 107. This right is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107.

We recognize that § 107 allows 100% cost recovery. Some pre-*Aviall* cases justified denying liable parties access to § 107, reasoning Congress would not have intended them to recover 100% of their costs and effectively escape liability. *See, e.g., United Techns.,* 33 F.3d at 100 ("it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable-to be permitted to recoup the whole of their expenditures.") We agree, and reaffirm *Dico's* holding that a liable party may not use § 107 to recover its full response cost.

But § 107 is not limited to parties seeking to recover 100% of their costs. To the contrary, the text of § 107(a)(4)(B) permits recovery of "any other necessary costs of response . . . consistent with the national contingency plan." While these words may "suggest full recovery," *United Techns.*, 33 F.3d at 100, they do not compel it.[8] CERCLA, itself, checks overreaching liable parties: If a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f). *Consolidated Edison*, 423 F.3d at 100, n.9; *Redwing Carriers*, 94 F.3d at 1495. Accordingly, we find that allowing Atlantic's claim for direct recovery under § 107 is entirely consistent with the text and purpose of CERCLA.

Alternatively, we are satisfied that a right to contribution may be fairly implied from the text of 107(a)(4)(B). Unlike some other statutes, CERCLA reflects Congress's unmistakable intent to create a private right of contribution. See *Northwest Airlines, Inc.* v. *Transp. Workers Union of Am.*, 451 U.S. 77, 91, 101 S. Ct. 1571, 1580, 67 L.Ed.2d 750 (1981) ("the ultimate question . . . is whether Congress intended to create the private remedy . . . that the plaintiff seeks to invoke"). We discern Congress's intent by looking to CERCLA's language, its legislative history, its underlying purpose and structure, and the likelihood that Congress intended to supersede or to supplement existing state remedies. *Id.*

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[8] Compare this text to § 107(a)(4)(A)'s more sweeping recovery of "all costs of response . . . not inconsistent with the national contingency plan."

Contribution is crucial to CERCLA's regulatory scheme. As the Supreme Court recognized in *Key Tronic*, "CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic*, 511 U.S. at 819, n.13, 114 S. Ct. 1960. At first, Congress left some CERCLA liability issues, such as joint-and-several liability and contribution, to be developed by the federal courts under "traditional and evolving principles of common law." *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 806-07 (S.D. Ohio 1983). Courts, thereafter, held § 107 and federal common law supported a right of contribution. *Id.*; *Mardan Corp.*, 804 F.2d at 1457 n.3. But when Congress revisited CERCLA in 1986, it enacted an explicit right to contribution in § 113. This reflects Congress's unambiguous intent to allow private parties to recover in contribution.

We must next ask whether, in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107. We conclude it did not. The plain text of § 113 reflects no intent to eliminate other rights to contribution; rather, § 113's saving clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action" under § 106 or § 107. § 113(f)(1). This view is further supported by examining § 113's legislative history reflecting Congress's intention to clarify and confirm, not to supplant or extinguish, the existing right to contribution. *See United Techns.*, 33 F.3d at 100, citing S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985). We conclude therefore that if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would

have done so explicitly. Accordingly, we consider the plain language of CERCLA to be consistent with an implied right to contribution for parties such as Atlantic.

We conclude that the broad language of § 107 supports not only a right of cost recovery but also an implied right to contribution.[9] *See Pinal Creek*, 118 F.3d at 1302 ("§ 107 implicitly incorporates a claim for contribution"); *United Techns.*, 33 F.3d at 99 n.8 ("It is possible that, although falling outside the statutory parameters for an express cause of action for contribution [under § 113(f)(1)], a [volunteer remediator] who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under § 107(c)"). We discern nothing in CERCLA's words, suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting—indeed, penalizing—those who voluntarily assume such duties.

The government argues that if we allow Atlantic a 107 remedy, we will render § 113 meaningless. Appellee's Br. at 24-25. This argument fails; liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality. But parties such as Atlantic, which have not faced a CERCLA action, and are thereby barred from § 113, retain their access to § 107. *See Key Tronic*, 511 U.S. at 818, 114 S. Ct. 1960; *United Techns.*, 33 F.3d at 99 n.8; *Pinal Creek*, 118 F.3d at 1301. This

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[9] As we have found a statutory right to direct recovery and contribution, we need not address Atlantic's claim of a similar right under federal common law. Accordingly, we leave that question for another day.

resolution gives life to each of CERCLA's sections, and is consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites. *Key Tronic*, 511 U.S. at 819, n.13, 114 S. Ct. 1960.

A contrary ruling, barring Atlantic from recovering a portion of its costs, is not only contrary to CERCLA's purpose, but results in an absurd and unjust outcome. Consider: in this, of all cases, the United States is a liable party (who else has rocket motors to clean?). It is, simultaneously, CERCLA's primary enforcer at this, among other Superfund sites. *See* Sophia Strong, Note, *Aviall Services* v. *Cooper Industries: Implications for the United States' Liability Under CERCLA, the "Superfund Law"*, 56 Hastings L.J. 193, 198-99 (2004).

If we adopted the Government's reading of § 107, the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination.

Congress understood the United States' dual role. When it enacted SARA, it explicitly waived sovereign immunity. CERCLA § 120(a). This waiver is part and parcel of CERCLA's regulatory scheme. It shows Congress had no intention of making private parties shoulder the government's share of liability. Strong, 56 Hastings L.J. at 209-10.

Here, Atlantic assisted the United States by helping modernize its defenses. Atlantic, recognizing the deleterious environmental consequences, remediated the environment without compulsion. Its choice to do so, especially where the ultimate compulsory authority lay with

the United States-corporate, will not be held to its detriment. The United States, under CERCLA, is liable for its share of the burden.

The Court, then, concludes Congress resolved the question of the United States' liability 20 years ago. It did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power. Congress put the public's right to a clean and safe environment ahead of the sovereign's traditional immunities.

We hold that a private party which voluntarily undertakes a cleanup for which it may be held liable, thus barring it from contribution under CERCLA's § 113, may pursue an action for direct recovery or contribution under § 107, against another liable party.

We reverse the judgment of the district court.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 1, 2005]

ORDER

Before the Court is the United States' Motion to Dismiss. (Doc. 28). ARC has responded. (Doc. 32). Upon consideration, for the reasons in the Opinion of even date, the Court finds the motion should be and hereby is **granted**.

IT IS SO ORDERED this 31 day of May, 2005.

/s/ HARRY F. BARNES
HON. HARRY F. BARNES
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 1, 2005]

MEMORANDUM OPINION

Atlantic Research Corporation ("ARC") brings this lawsuit pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, *et seq.*, against the United States of America, seeking to recover cleanup costs ARC incurred at an environmentally contaminated facility in Camden, Arkansas.

Before the Court is the United States' Motion to Dismiss. (Doc. 28). ARC has responded. (Doc. 32). On May 12, 2005, the Court also conducted a hearing on the Motion. The Court finds this Motion ripe for consideration.

I. Background

ARC filed this lawsuit on December 12, 2002, pursuant to Sections 113(f) and 107(a) of CERCLA.

This Court stayed the case for several months while the parties conducted settlement negotiations. During the United States Supreme Court's 2004 Term, it decided *Cooper Industries, Inc. v. Aviall Services, Inc.*, U.S. ____, _____, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). *Aviall* brought about a sea change in this lawsuit.

Aviall held that Section 113(f) of CERCLA did not authorize a party that is potentially subject to CERCLA liability, but has not been sued under Section 106 or 107(a) of CERCLA and has not resolved its liability through an administrative or judicially approved settlement, to seek contribution under CERCLA from another jointly liable party. *Aviall* left unanswered the question of whether a such a party could assert a cost recovery claim under an implied right to contribution under Section 107(a), although the majority, in dicta, suggested that the right did not exist.

After *Aviall*, ARC moved to amend its Complaint, dropping its Section 113(f) claims (because it had not been sued under Section 106 or 107(a) of CERCLA and had not resolved its liability through an administrative or judicially approved settlement) and asserting that the sole basis of its recovery against the United States was Section 107(a). This Court granted ARC's Motion to Amend, and, rather than answering ARC's Amended Complaint, the United States filed a Motion to Dismiss, arguing that ARC cannot rely on Section 107(a) to recover its cleanup costs.

II. Discussion

In ruling upon a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the Court is required to accept the factual allegations of ARC's Amended Complaint as true and view the facts in the light most favorable to ARC. *Miller v. Pilgrim's Pride Corp.*, 366 F.2d 672, 673 (8th Cir. 2004). The Court may grant the United States' Motion only if, after so viewing the pleadings, it is patently clear that there is no set of facts that ARC could provide thereunder which would entitle it to the relief sought in the Amended Complaint. *Id.*

In its Amended Complaint, ARC alleges that it leased property at the Highland Industrial Park in Camden, Arkansas, from 1979 until October 2003.[1] Originally this leased property was part of the Shumaker Naval Ammunition Depot, which was a facility operated by the Department of Defense.[2]

ARC and the United States entered into a contract by which ARC agreed to retrofit thousands of rocket motors by removing an amonium percholrate-based propellant and replacing it with a new double-based propellant.[3] ARC used a high pressure washer system to remove the amonium percholrate-based propellants from the rocket motors, and during this process, propellant-contaminated wastewater entered the soil and groundwater.[4] Periodically, ARC also burned pieces of the propellant and, during the burning process, portions of solid

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[1] (Pl.'s Am. Compl. ¶ 7).

[2] (*Id.* ¶ 8).

[3] (*Id.* ¶ 14).

[4] (*Id.* ¶¶ 20, 24).

propellant pieces and propellant-contaminated wastewater also were released into the environment.[5]

ARC alleges that the United States is liable under CERCLA because it owned the rocket motors and operated the Camden site at the time hazardous substances were disposed from the motors and because it arranged for the transport and refurbishment of the rocket motors knowing that the generation and disposal of wastes containing hazardous substances was inherent in the refurbishment process.[6] ARC seeks an award of its response costs incurred to date under CERCLA Section 107(a) and federal common law, or both.[7]

CERCLA identifies four categories of parties responsible for cleanup costs at a contaminated facility, more commonly known as potentially responsible parties ("PRP"s):

> (1) [T]he owner or operator of . . . [the] facility,
>
> (2) [A]ny person who at the time of disposal of any hazardous substance owned or operated . . . [the] facility . . .
>
> (3) [A]ny person who . . . arranged for disposal or treatment . . . of hazardous substances . . . at the facility . . ., and
>
> (4) [A]ny person who accepts . . . hazardous substances for transport to [the facility for disposal or treatment]. *See* 42 U.S.C. § 9607(a)(1)-(4).

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[5] (*Id.* ¶¶ 25, 29).

[6] (*Id.* ¶¶ 67, 71, 75, 76).

[7] (*Id.* Prayer for Relief ¶ 2).

Section 107(a)(4)(A) and (B) make PRP's liable for:

> (A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. *See* 42 U.S.C. § 9607(a)(4)(A)-(B).

As stated earlier, *Aviall* left unanswered the question of whether a PRP could assert a cost recovery claim under an implied right to contribution under Section 107(a). However, it appears the Eighth Circuit has already answered this question, holding that a PRP cannot rely on Section 107(a) to seek full cost recovery on a theory of joint and several liability from another jointly liable party; rather, a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f), unless the PRP qualifies for one of three defenses. *Dico v. Amoco Oil Company*, 340 F.3d 525 (8th Cir. 2003). These three defenses apply if the damage resulting from contamination was due to: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party other than one . . . [which] occurs in connection with a contractual relationship. . . ." *Id.* at 531, *citing* 28 U.S.C. § 9607(b). The defenses are available because "when one of the enumerated CERCLA defenses applies a PRP is deemed innocent; and an action between an innocent party and another PRP is not between two liable parties." *Id.*

ARC does not dispute that it and the United States are PRPs or argue that it is eligible for any of these

three defenses. Therefore, existing precedent appears to preclude ARC's Section 107(a) claims against ARC.

ARC acknowledges this precedent but argues that *Aviall* has undermined the fundamental support for *Dico* and other circuits' decisions that Section 113(f) limits PRP's claims for contribution and precludes actions between PRPs for direct recovery under Section 107(a). ARC's position finds support from some district courts who have passed on this issue. *See Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005) (holding despite *Aviall* and existing circuit precedent, PRP can bring a claim under Section 107(a) when it cannot meet the specific requirements of Section 113(f)(1)); *Metropolitan Water Reclamation District of Greater Chicago v. Lake River Corp.*, 365 F. Supp. 2d 913 (N.D. Ill. 2005) (same). *See also Syms v. Olin Corp.*, ____ F.3d ____, 2005 WL 1164011, *8 n.8 (2nd Cir. 2005) (recognizing in dicta that *Aviall* combined with existing Second Circuit precedent would leave a PRP with no mechanism for recovering response costs until proceedings are brought against the PRP; expressing opinion that such a result "would create a perverse incentive for PRPs to wait until they are sued before incurring response costs").

In contrast, other district courts confronted with this issue have found that *Aviall*, combined with existing precedent, effectively precludes an implied cause of action pursuant to CERCLA Section 107(a). *See City of Waukesha v. Viacom Int'l, Inc.*, 362 F. Supp. 2d 1025 (E.D. Wis. 2005) (denying plaintiff's motion to amend as futile, finding *Aviall* did not vacate Seventh Circuit precedent that held landowner who was a party liable in some measure for the contamination must seek contribu-

tion under § 113(f)); *Mercury Mall Assoc. v. Nick's Market, Inc.*, _____ F. Supp. 2d _____, No. Civ. A. 4:04CV80, 2005 WL 1017855, *5 (E.D. Va. Feb, 28, 2005) (denying plaintiff's motion to amend, recognizing that although result was quixotic, the combined result of *Aviall* and existing precedent precluded implied right of contribution under 107(a) and left PRP without a remedy); *Elementis Chems., Inc. v. TH Agric. & Nutrition, LLC*, No. 03 Civ. 5150 (LBS), 2005 WL 236488 (S.D.N.Y. Jan. 31, 2005) (finding a PRP without defense to damages precluded from bringing 107(a) cost recovery action following *Aviall*).

This Court agrees with the logic that the holdings of existing Eighth Circuit precedent and *Aviall* leave a party in ARC's position without a remedy. *Aviall* specifically declined to address the issue of whether as an alternative to an action for contribution under Section 113(f)(1), a PRP could recover costs under Section 107(a). *Aviall*, 125 S.Ct. at 586. *Aviall* does not undermine the Eighth Circuit precedent in *Dico*, precedent that this Court is bound to follow. *See Hood v. U.S.*, 342 F.3d 861, 864 (8th Cir. 2003) (holding district court in Eighth Circuit is bound to apply to the precedent of the Eighth Circuit Court of Appeals); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 2001) (holding panel of court of appeals cannot overrule another panel unless the earlier panel decision is cast into doubt by a decision of the Supreme Court). The Court recognizes that the result reached in this Order is patently unfair to ARC, because it has voluntarily cleaned up environmental contamination, yet it is left without a CERCLA remedy against the United States, another PRP. Perhaps the Eighth Circuit will give attention to these consequences if it considers the holding of *Dico*.

III. Conclusion

Based on the foregoing, the Court finds the Motion to Dismiss should be and hereby is **granted**. An Order of even date consistent with this Opinion shall issue.

IT IS SO ORDERED this 31 day of May, 2005.

/s/ HARRY F. BARNES
HON. HARRY F. BARNES
U.S. District Judge

APPENDIX C

1. 42 U.S.C. 9607 provides:

Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of

a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of Title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence

within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33, 46, or 46 Appendix, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or

damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Natural resources liability; designation of public trustees of natural resources

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust

restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages,

including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this

chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

(g) Federal agencies

For provisions relating to Federal agencies, see section 9620 of this title.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) [46 App. U.S.C. 182, 183, 184-188] or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of a registered pesticide product

No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and

Rodenticide Act [7 U.S.C. 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-Closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C. 6926(b)]) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State

determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure

financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) SUSPENSION OF LIABILITY TRANSFER.—Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 9611 of this title, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 9641 of this title prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) STUDY OF OPTIONS FOR POST-CLOSURE PROGRAM.—

(A) STUDY.—The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) PROGRAM ELEMENTS.—The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) ASSESSMENTS.—The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 U.S.C. 6925] and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to—

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) PROCEDURES.—In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) CONSIDERATION OF OPTIONS.—In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to—

(i) revisions to closure, post-closure, and financial responsibility requirements under sub-

titles C and I of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq. and 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 9641 of this title, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) RECOMMENDATIONS.—The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appro-

priate committees of Congress for additional authority to implement such program.

(*l*) Federal lien

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which—

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable

through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of Title 26.

(4) Action in rem

The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this

subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) Maritime lien

All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) of this section with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(n) Liability of fiduciaries

(1) In general

The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(2) Exclusion

Paragraph (1) does not apply to the extent that a person is liable under this chapter independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(3) Limitation

Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(4) Safe harbor

A fiduciary shall not be liable in its personal capacity under this chapter for—

(A) undertaking or directing another person to undertake a response action under subsection (d)(1) of this section or under the direction of an on scene coordinator designated under the National Contingency Plan;

(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

(C) terminating the fiduciary relationship;

(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

(F) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

(I) declining to take any of the actions described in subparagraphs (B) through (H).

(5) Definitions

As used in this chapter:

(A) Fiduciary

The term "fiduciary"—

(i) means a person acting for the benefit of another party as a bona fide—

(I) trustee;

(II) executor;

(III) administrator;

(IV) custodian;

(V) guardian of estates or guardian ad litem;

(VI) receiver;

(VII) conservator;

(VIII) committee of estates of incapacitated persons;

(IX) personal representative;

(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

(ii) does not include—

(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or

(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

(B) Fiduciary capacity

The term "fiduciary capacity" means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(6) Savings clause

Nothing in this subsection—

(A) affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this subsection; or

(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

(7) No effect on certain persons

Nothing in this subsection applies to a person if the person—

(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and

(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and

(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(8) Limitation

This subsection does not preclude a claim under this chapter against—

(A) the assets of the estate or trust administered by the fiduciary; or

(B) a nonemployee agent or independent contractor retained by a fiduciary.

(*o*) De micromis exemption

(1) In general

Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this chapter if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that—

(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

(2) Exceptions

Paragraph (1) shall not apply in a case in which—

(A) the President determines that—

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility; or

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

(3) No judicial review

A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

(4) NonGovernmental third-party contribution actions

In the case of a contribution action, with respect to response costs at a facility on the National Priorities List, brought by a party, other than a Federal, State, or local government, under this chapter, the burden of proof

shall be on the party bringing the action to demonstrate that the conditions described in paragraph (1)(A) and (B) of this subsection are not met.

(p) Municipal solid waste exemption

(1) In general

Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) of this section for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is—

(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

(B) a business entity (including a parent, subsidiary, or affiliate of the entity) that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 et seq.)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or

(C) an organization described in section 501(c)(3) of Title 26 and exempt from tax under

section 501(a) of Title 26 that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection, the term "affiliate" has the meaning of that term provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

(2) Exception

Paragraph (1) shall not apply in a case in which the President determines that—

(A) the municipal solid waste referred to in paragraph (1) has contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility;

(B) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter; or

(C) the person has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility.

(3) No judicial review

A determination by the President under paragraph (2) shall not be subject to judicial review.

(4) Definition of municipal solid waste

(A) In general

For purposes of this subsection, the term "municipal solid waste" means waste material—

(i) generated by a household (including a single or multifamily residence); and

(ii) generated by a commercial, industrial, or institutional entity, to the extent that the waste material—

(I) is essentially the same as waste normally generated by a household;

(II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and

(III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

(B) Examples

Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

(C) Exclusions

The term "municipal solid waste" does not include—

(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

(ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.

(5) Burden of proof

In the case of an action, with respect to response costs at a facility on the National Priorities List, brought under this section or section 9613 of this title by—

(A) a party, other than a Federal, State, or local government, with respect to municipal solid waste disposed of on or after April 1, 2001; or

(B) any party with respect to municipal solid waste disposed of before April 1, 2001, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraphs (1) and (4) for exemption for entities and organizations described in paragraph (1)(B) and (C) are not met.

(6) Certain actions not permitted

No contribution action may be brought by a party, other than a Federal, State, or local government, under this chapter with respect to circumstances described in paragraph (1)(A).

(7) Costs and fees

A nongovernmental entity that commences, after the date of the enactment of this subsection, a contribution action under this chapter shall be liable to

the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees, if the defendant is not liable for contribution based on an exemption under this subsection or subsection (o) of this section.

(q) Contiguous properties

(1) Not considered to be an owner or operator

(A) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not—

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person—

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) At the time at which the person acquired the property, the person

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) Demonstration

To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) Bona fide prospective purchaser

Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 9601(40) of this title if the person is otherwise described in that section.

(D) Ground water

With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in

an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) Effect of law

With respect to a person described in this subsection, nothing in this subsection—

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a) of this section.

(3) Assurances

The Administrator may—

(A) issue an assurance that no enforcement action under this chapter will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 9613(f) of this title.

(r) Prospective purchaser and windfall lien

(1) Limitation on liability

Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as

long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) Lien

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) Conditions

The conditions referred to in paragraph (2) are the following:

(A) Response action

A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) Fair market value

The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) Amount; duration

A lien under paragraph (2)—

(A) shall be in an amount not to exceed the increase in fair market value of the property

attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of—

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 9613 of this tile, recovery of all response costs incurred at the facility.

2. 42 U.S.C. 9613 provides:

Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance

activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be

commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or

remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State

shows that the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were

so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of Title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regu lations in accordance with chapter 5 of Title 5 to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the

selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(*l*) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.